NO. 56006-2-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
DAVID W. RICARDEZ,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. MISTACHKIN, JUDGE

RESPONDENT'S BRIEF

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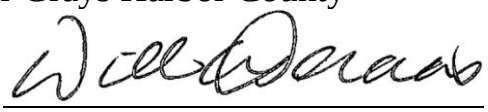
BY: 

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COUNTERSTATEMENT OF THE CASE

Although Appellant's Statement of the Case is generally accurate as to the procedural history of this case, it is selective and incomplete. For simplicity's sake, Respondent will provide supplemental facts within the appropriate argument sections below.

However, the State points out that the subject of the defense of voluntary intoxication came up unexpectedly, in the middle of the first day of trial, with no notice to the State. The court took a break from trial testimony to hold a hearing outside the presence of the jury, hearing briefly from only Mr. Ricardez, 06/15/21 RP 164-171, and then made its ruling prior to hearing the bulk of the evidence and testimony, without briefing and without engaging in any of the analysis as set forth below. 06/15/21 RP 150-174. That being said, the court's ruling should be read as allowing the defense to present evidence of Mr. Ricardez's drug use with an eye towards a

possible voluntary intoxication defense, not a ruling that the instruction would be given. 06/15/21 RP 171-174.

As will be shown herein, the evidence produced at trial did not support the giving of the instruction.

ARGUMENT

1. Introduction and Standard of Review.

The main issue in this case is defense counsel's failure to request a voluntary intoxication instruction based on Appellant's alleged drug use the day of the incident, October 29, 2020. The voluntary intoxication instruction is set forth in WPIC 18.10, and an instruction in this case would read as follows:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, in determining whether the defendant acted with intent, evidence of intoxication may be considered.

Voluntary intoxication is not a complete defense to a crime, and does not excuse the criminality of the act, but allows the jury in

the first instance to consider whether the defendant was able to form a particular mental state. *State v. Stacy,* 181 Wn. App. 553, 569, 326 P.3d 136 (2014).

Appellant challenges his convictions for assault in the second degree, count one, burglary in the first degree, count two, and assault in the third degree, count five (originally charged as assault in the second degree), based upon defense counsel's failure to request the instruction. Appellant does not challenge his convictions on counts three and four, possession of a stolen vehicle and unlawful possession of a firearm in the second degree, nor does he challenge the sufficiency of the evidence as to any of his convictions.

Mr. Ricardez argues that his trial counsel provided ineffective assistance by not requesting an instruction on voluntary intoxication, given the fact that at a hearing outside the presence of the jury the court ruled that evidence of Mr.

Ricardez's could be presented, and given the fact that intoxication was argued during closing argument.

Mr. Ricardez is also requesting that his sentence on count one, assault in the second degree, be amended so that the combination of incarceration, community custody and enhancement does not exceed 120 months, and that the judgment & sentence be further clarified upon remand.

Claims of ineffective assistance of counsel, as well as instructional errors, are reviewed de novo. *State v. Backemeyer,* 5 Wn. App. 2d 841, 428 P.3d 266 (2018) (ineffective assistance); *State v. Harris,* 164 Wn. App. 377, 263 P.3d 1276 (2011).

2. Appellant's claim of ineffective assistance of counsel is without merit because on the facts below he cannot show that defense counsel's representation was deficient or that there is a reasonable probability that but for the alleged error the result of the proceeding would have been different.

"To prevail on a claim of ineffective assistance of counsel, [the defendant] must establish both deficient performance and prejudice." *State v. Jones*, 183 Wn.2d 327, 330, 352 P.3d 776 (2015) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

"Deficient performance is performance falling 'below an objective standard of reasonableness based on consideration of all the circumstances.'" *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). Appellate courts are highly deferential to the performance of counsel in evaluating the reasonableness of their actions. *State v. Crawford*, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). "There is a strong presumption that trial counsel's representation was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions." *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Whether counsel's performance

was ineffective depends on the facts of the case, requiring a case by case analysis. *State v. Cienfuegos,* 144 Wn.2d 222, 229, 25 P.3d 1011 (2001).

Deficient performance prejudices a defendant when a "substantial" likelihood of a different outcome exists; it is not enough for a different outcome to be merely "conceivable." *In re Pers. Restraint of Lui,* 188 Wn.2d 525, 538-39, 397 P.3d 90 (2017). There must be a reasonable probability (a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Cienfuegos,* 144 Wn.2d at 229. If a defendant fails to satisfy showing deficient performance or prejudice, the inquiry ends. *State v. Hendrickson,* 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

a. Based on the evidence produced at trial Appellant was not entitled to an instruction on involuntary intoxication and thus it was not ineffective assistance for defense counsel not to request one;

> **further, Appellant has not engaged in the proper analysis.**
>
> We first determine whether the defendant was entitled to the instruction – voluntary intoxication. *See State v. King,* 24 Wn. App. 495, 501, 601 P.2d 982 (1979) (counsel not ineffective for failing to present a defense not warranted by the facts). We next decide whether it was appropriate *not* to ask for the instruction. *See State v. McFarland,* 127 Wn.2d 322, 336, 899 P.2d 1251 (1995) (requiring defendant to show absence of legitimate strategic or tactical rationales for challenged attorney conduct). Finally, we must decide whether he was prejudiced. *See State v. Cienfuegos,* 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001) (rejecting argument that failure to propose an instruction to which defendant was entitled under the law constitutes per se ineffective assistance of counsel).

State v. Kruger, 116 Wn. App. 685, 690-91, 67 P.3d 1147 (2003) (emphasis in the original).

A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of consumption of the drugs, and (3) there is evidence that the drugs affected the defendant's

ability to form the requisite intent or mental state. *See Kruger*, 116 Wn. App. at 691. The evidence must reasonably and logically connect the defendant's intoxication and the asserted inability to form the requisite level of culpability to commit the crime charged. *State v. Gabryschak,* 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996) (citing *State v. Griffin,* 100 Wn.2d 417, 418-19, 670 P.2d 265 (1983)). Evidence of drug use alone is insufficient to warrant the instruction; rather, there must be "substantial evidence of the effects of [the drugs] on the defendant's mind or body." *Id.* at 253 (quoting *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 179, 817 P.2d 861 (1991), *review denied,* 118 Wn.2d 1010 (1992)).

"Simply showing that someone has been drinking is not enough. The evidence must show the effects of the alcohol:

> Intoxication is not an all-or-nothing proposition. *A person can be intoxicated and still be able to form the requisite mental state,* or he can be so intoxicated as to be unconscious. Somewhere between these two extremes of intoxication is a point on the scale at which a rational trier of fact can conclude that the

> State has failed to meet its burden of proof with respect to the required mental state."

Kruger at 692 (citing *Gabryschak* at 254) (emphasis added).

In *Gabryschak, supra,* officers were sent to Gabryschak's mother's apartment in response to reported yelling. He refused to let the officers into the apartment and tried to run while being escorted to the police car. *Gabryschak*, 83 Wn. App. at 251, 254-55. Gabryschak was later charged with, among other things, malicious mischief in the third degree. *Id.* at 252. At trial, the testimony from the officers and from Gabryschak's mother was that Gabryschak was very intoxicated, had had a couple of drinks and was too drunk to drive. *Id.* at 253. On appeal, the court held that "[a] person can be intoxicated and still be able to form the requisite mental state." *Id.* at 254. Because the facts at trial indicated that Gabryschak understood the situation with the police, the court concluded that the trial court did not err in rejecting the request for a voluntary intoxication instruction. *Id.* at 255.

In *State v. Walters,* 162 Wn. App. 74, 255 P.3d 835 (2011), Mr. Walters arrived at a bar in Ritzville (where he was formally the manager) at about 6:00 p.m. and stayed until about 1:30 a.m. During that time, he drank at least seven beers and two other shots of alcohol. The bartender would later rate his level of intoxication as four on a scale of one to ten; two police officers put his level of intoxication between four and six. *Walters*, 162 Wn. App. at 78.

After Walters left the bar, Ritzville Police Sergeant Bartz, investigating a burglary, encountered him in an alley at about 2:15 a.m. *Id.* at 78, 83. The officer noted that Walters was holding a set of keys on a square key ring attached to a green carabiner, which Walters put in his left pocket, *Id.* at 78, and that he had slurred speech, droopy, bloodshot eyes and that he swayed back and forth. *Id.* at 83. Shortly after Walters left the bar, the bartender discovered that the bar keys (on a square key ring attached to a green carabiner) were missing and

reported the missing keys to police; a description of the missing keys was broadcast by dispatch. *Id.* at 78-79.

Sergeant Bartz heard the broadcast and recalled his encounter with Walters. Walters operated an arcade near the bar and Sergeant Bartz went to the arcade. He looked through the window and saw Walters sleeping on the floor under an air hockey table. *Id.* at 79. He tapped on the window and Walters let him in. Sergeant Bartz told him why he was there. Walters denied having the keys; however, while he was talking to Sergeant Bartz he put his hand in his left pocket and jiggled the key ring. Sergeant Bartz retrieved the keys from Mr. Walters' pocket while placing him under arrest. *Id.* Walters cursed the sergeant and resisted arrest. Sergeant Bartz had to use his stun gun on Walters twice and called for backup. After the second officer arrived, the two of them were able to gain compliance and place Mr. Walters in the patrol car. At the jail, Walters continued to resist the officers and kicked one of them. *Id.*

Walters was charged with third degree assault, third degree theft and resisting arrest. Mr. Walters testified that he "did not remember leaving the bar and had little memory of interacting with the officers." *Id.* The defense requested a voluntary intoxication instruction but the trial court declined to give one, believing that such an instruction would lead the jury to speculate about Mr. Walters' mental state. *Id.* Nevertheless, in closing the parties argued whether or not Walters was too intoxicated to act intentionally. *Id.* at 84. Walters was convicted as charged. *Id.* at 79.

On appeal, the court found that the first two elements required to give a voluntary intoxication defense had been met: all three charges had a requisite mental state (intent) and there was a showing of alcohol consumption and its effect on the drinker. *Id.* at 82. "While the degree of intoxication was in dispute, there was no question but that Mr. Walters had

consumed at least nine drinks over the course of the evening and they had affected him." *Id.* at 82-83.

As for the third element, whether his intoxication affected Mr. Walters' ability to act with intent, the court termed it "problematic" and presenting a "close fact pattern because there is no direct evidence that intoxication affected Mr. Walters' mental state." *Id.* at 83. Ultimately, the court concluded that there was sufficient evidence of intoxication to merit the giving of the instruction and that the trial court's refusal to give the instruction was error. *Id.*

The court then went on to consider if the refusal to give the instruction was harmless. "Instructional error is presumed prejudicial but can be shown to be harmless." *Id.* at 84 (citing *State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984)). "A nonconstitutional [sic] error such as this one is harmless if it did not, within reasonable probability, materially affect the

verdict." *Id.* (citing *State v. Zwicker,* 105 Wn.2d 228, 243, 713 P.2d 1101 (1986)).

> As to the theft conviction, we cannot find the error harmless. The third degree theft conviction is reversed, and the case is remanded for a new trial.
>
> The other two convictions are differently situated. Those crimes were committed well after Mr. Walters left the bar and, presumably, he had begun to sober up some. More importantly, there is direct evidence that his mental state was not impaired. The assault was committed at the jail while officers were trying to book Mr. Walters into custody. *He announced that he was going to kick Officer Cameron before he did so. In that circumstance, the failure to give the intoxication instruction was harmless error because there was no question but that Mr. Walters was acting intentionally.*
>
> Similarly, the evidence shows that he intentionally resisted arrest. Where he had been cooperating with the officer initially, his attitude changed when the keys were seized and he was arrested. A struggle ensued, a stun gun was repeatedly employed, and a second officer had to be called in to take Mr. Walters away. His resistive behavior continued at the jail, right up to the point where he announced his intention to kick the officer. *At trial, Mr. Walter even admitted that he resisted arrest. In light of the evidence and the trial testimony, the intoxication instruction would not have affected the verdict.*

> The lack of an intoxication instruction was harmless error on the assault and resisting arrest instructions.

Walters at 84-85 (emphasis added).

Both assault in the second degree and burglary in the first degree contain the mental element of intent. An assault is an intentional touching or striking. WPIC 35.05; instruction no. 37, CP 66. Burglary requires that a person enter or remain unlawfully in a building with the intent to commit a crime against a person or property therein. RCW 9A.52 020(1). A person acts with intent "when acting with the objective or purpose to accomplish a result that constitutes a crime." RCW 9A.08.010(1)(a); instruction no. 34, CP 65. As for count 5, striking Mr. Johannesen with the car, Appellant was charged with assault in the second degree but was convicted of the lesser offense of assault in the third degree with criminal negligence. CP 84. A person acts with criminal negligence when he or she "fails to be aware of a substantial risk that a

wrongful act may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(d); instruction no. 36, CP 65-66.[1] Thus, the first requirement for the giving of a voluntary intoxication instruction is met: a mental state. *Kruger*, 116 Wn. App. at 691.

While the first requirement is satisfied in this case, the second and third are not. There must be *substantial* evidence of consumption of drugs and evidence that the drug use affected Appellant's ability to form the requisite intent or mental state. *Id.* Here there is neither.

The only evidence of Appellant's drug use in this case came from the uncorroborated testimony of the Appellant himself. He testified that he used two times the morning of his arrest, sometime between 7:00 a.m. and 9:00 a.m., and again

[1] However, intoxication is not a defense to the forms of assault in the third degree that involve only the mental state of criminal negligence. *State v. Coates*, 107 Wn.2d 882, 892-93, 735 P.2d 64 (1987).

after fleeing in the car prior to running up the hill to Mr. Higgins' house. 06/16/21 RP 203. When asked how much methamphetamine he uses he said "[j]ust a lot" and that he "smoke[s] all day." 06/16/22 RP 203. A blood draw was not performed to determine what levels of methamphetamine, if any, Mr. Ricardez had in his blood. No expert testified as to the effects of methamphetamine (although, admittedly, impairment from drug usage is a factual question that can be proved by lay testimony. *State v. Smissaert*, 41 Wn. App. 813, 815, 706 P.2d 647, *review denied*, 104 Wn.2d 1026 (1985)). And, after acknowledging Detective Perkinson's experience and expertise in the field of narcotics investigation, defense counsel asked, "[i]s it your testimony that he was not under the influence?", to which Detective Perkinson answered "I – I don't know if he was or not." 06/16/21 RP 175. This is far from the standard of evidence of *substantial* use found to be satisfied in *Walters, supra*, wherein the court found that "there was no question but

that Mr. Walters had consumed at least nine drinks over the course of the evening and that they had affected him." *Walters,* 162 Wn. App. at 82-83

Nor did the testimony support the third requirement, that the intoxication, if any, affected Mr. Ricardez's ability to act intentionally. In fact, the officers who interacted with the Appellant testified that, other than the normal manifestations of someone involved in a stressful situation who has been running and hiding from the police, Appellant's behavior and responses to their questions was appropriate (Detective Perkinson testified that, with regard to his sweating and gasping for air that the Appellant "had just for several minutes been in a high stress situation fleeing from law enforcement and being engaged in – in the other issues.") 06/16/21 RP 172.

Officer Brandi Slater testified that Appellant did not claim to be delusional or high and that he was cooperative, 06/16/22

RP 60, 62, and that when she spoke with Appellant he responded appropriately. 06/16/22 RP 63.

Officer Gary Sexton testified as to his conversations with Mr. Ricardez in an attempt to de-escalate the situation while he was on the roof of Mr. Higgins' home:

> MS. NOGUEIRA: Is there anything that you look for when you're trying to de-escalate a situation?
>
> SEXTON: I'm just want [sic] to engage the person in conversation. That's basically what I'm looking for. And obviously safety is a big thing. If we can see his hands and at which point if his hands disappeared, we'd quickly remind him to show us his hands. But I just want to engage the person in conversation. That's what I'm looking for when I'm de-escalating somebody is just can I talk to them. And he seemed to engage with me and understood what I was saying so I thought that we were having some kind of matching – you know what I mean – and able to talk to him. So he seemed quite coherent in that to have a conversation with me.

06/15/21 RP 177-178. Sexton went on to explain that by "engaging" he meant that "as we were talking, he was having

an intelligent conversation with me." 06/15/21 RP 181. And upon redirect by the prosecutor:

> MS. ZORN: So he was answering your questions appropriately?
>
> SEXTON: He was.
>
> MS. ZORN: Okay. And was he answering the other questions by Detective Perkinson correctly?
>
> SEXTON: To my knowledge, he did. There was nothing that stood out that – that he answered that was out of the norm or something, if that's what you're asking.

06/15/21 RP 182.

Detective Peterson was the first to speak with the Appellant when officers arrived on scene. Perkinson instructed the Appellant to keep his hands where Perkinson could see them, and Mr. Ricardez immediately responded to and complied with Perkinson's commands. 06/16/21 RP 113. As Perkinson lowered the tone of his voice, the Appellant calmed down as well, 06/16/21 RP 114, and was speaking clearly with Perkinson. 06/16/21 RP 173. Appellant did not tell Perkinson

that he was delusional, out of his mind, or high. 06/16/21 RP 176.

With regard to Mr. Ricardez requesting that the officers shoot him, Detective Perkinson felt the need to put that "in context" when pressed on the issue by defense counsel (as apparently the defense viewed this as some sort of evidence that he was either high or delusional):

> [A]s we were speaking back and forth, he – he also divulged that he was looking at going to prison for a long time, he did not want to go back to prison. You should just shoot me. No, I don't want to shoot you. I don't want to hurt you. That was the context of the type of conversation that was going on. He knew that he was - he was trapped up on the roof and there was no way that he was going to get away at this point in time. The more resources that were getting there he started to say, okay, okay, I'll just jump down. No, we don't want you to jump down, because you're going to get hurt and we weren't ready for him to do that yet. So that's some of the context of how that conversation was going.

06/16/21 RP 170-171.

Appellant's own testimony demonstrates that he had the ability to plan, reason and otherwise act with the requisite intent. Appellant was able to recount and testify as to his recollection of events of that day, October 29, 2020, from the time he arrived in Aberdeen and woke up at Anytime Fitness, going to a local store to buy some cigarettes and a "meth pipe', trying to get away from Mr. Johannesen and striking him with the car (he was able to describe Mr. Johannesen as being in front of the car and trying to grab it), to running up a hill, entering Mr. Higgins's house and assaulting him and fleeing to the roof and interacting with police. 06/15/21 RP 164 et seq.; 06/16/21 RP 183 et seq.

He was able to accurately recall that he fled in the stolen car at about 11:00 a.m. 06/16/21 RP 189. He knew the car was stolen. 06/16/21 RP 211,218, 219. He knew that he was not allowed to possess a firearm due to his criminal history. 06/16/21 RP 212. In fact, he knew at some point he would have

to hide or get rid of the gun and his drugs: "I decided that I was going to collect everything I had on me that was illegal and just have it ready to ditch or hide." 06/16/21 RP 195.

His "plan" when he entered Mr. Higgins's house was to hide from the police. 06/15/21 RP 168, 169. He knew the "cops" were after him. 06/15/21 RP 170. He was able to recount his conversation and interaction with Mr. Higgins. 06/15/21 RP 170. He testified that he hit Mr. Higgins with the gun because he wouldn't let go of him: "I was trying to get him off of me. I couldn't get him off" and that he may have hit him once or twice. 06/16/21 RP 197. He testified that "I've never denied assaulting anybody." 06/15/21 RP 171. He testified that he asked about Mr. Higgins after coming down from the roof because "I didn't intend for nobody to get hurt. I'm not a violent person," 06/16/21 RP 201, and that he was trying to be cooperative. 06/16/21 RP 204, 205-206.

He demonstrated an awareness of current events, which was the reason he threw the gun down from the roof: "In the world these days, like people with handguns, like cops don't resist it – they don't – there's no talking if they see that." 06/16/21 RP 200.

In *Gabryschak, supra,* the court held that an intoxicated and angry man was not entitled to a voluntary intoxication instruction where there was no sign of alcohol's impact on his reasoning abilities. *Gabryschak*, 83 Wn. App. at 253. Furthermore, Gabryschak ran from the deputies, which indicated he was aware that he was under arrest (similar to Appellant). *Id.* at 254-55.

Compare the facts in *Gabryschak* to those in *Kruger, supra.* Kruger showed at an acquaintance's house drunk and acting "obnoxious and rude." *Kruger*, 116 Wn. App. at 688. When an officer showed up and tried to speak with him Kruger swung a beer bottle at him. *Id.* at 688-89. Pepper spray had

little effect on Kruger and, once at the jail, he began vomiting." *Id.* at 689, 692. Kruger was charged with third degree assault but his defense counsel did not request a voluntary intoxication instruction. On appeal, the court concluded that Kruger was entitled to such an instruction because there was "ample evidence of his level of intoxication on both his mind and body." *Id.* at 692. Kruger was physically ill, he experienced a "blackout", and compliance techniques "had little effect," which "is usually the case when one is highly intoxicated." *Id.* at 689, 692. *See also State v. Brooks*, 97 Wn.2d 873, 651 P.2d 217 (1982) (two day drinking binge; defendant had glassy eyes and slurred speech, and ate a spider while washing it down with whiskey); and *State v. Jones*, 95 Wn.2d 616, 622, 628 P.2d 472 (1981) (defendant with glassy eyes and slurred speech placed in "drunk tank").

In the case at hand, there was no such evidence. The evidence indicates that Mr. Ricardez was oriented as to time

and place. As demonstrated, he was able to carry on rational and appropriate conversations with law enforcement, and respond appropriately to their commands. He did not black out nor exhibit symptoms of withdrawal. Although Mr. Ricardez had more than likely used drugs that day, there was not *substantial* evidence of drug use or that it affected his ability to act intentionally.

b. Even if this court finds that it was error for defense counsel not to request a voluntary intoxication instruction, the Appellant was not prejudiced and thus defense counsel did not render ineffective assistance.

Even if this court were to find that Appellant was entitled to an involuntary intoxication instruction, that is not the end of the inquiry. In *Cienfuegos, supra,* the Supreme Court found that Cienfuegos would have been entitled to a diminished capacity instruction had it been offered. *Cienfuegos,* 144 Wn.2d at 227. "Cienfuegos submitted *considerable* evidence that he was incapable of forming the requisite intent due to

cognitive impairment." *Id.* at 228 (emphasis added). The court declined to establish a rule that the failure to request such an instruction was per se ineffective assistance. "The question of whether counsel's performance was ineffective is generally not amenable to per se rules, but requires a case by case basis analysis. We therefore hold the failure to request a diminished capacity instruction is not ineffective assistance of counsel per se." *Id.* at 229. The court went on to hold that Cienfuegos did not received ineffective assistance due to defense counsel's failure to request the instruction under the facts of the case:

> Cienfuegos fails to satisfy the second prong of the *Strickland* test: the existence of a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 446 U.S. at 687, 100 S. Ct. 1945. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694, 100 S. Ct. 1945.

Cienfuegos at 229. After noting that the jury was instructed on both knowledge and intent, the court concluded:

> In closing both the prosecutor and defense counsel argued extensively about Cienfuegos's ability to have knowledge or form the requisite intent. From this instruction, the jury could have taken into account Cienfuegos's impairment. The diminished capacity instruction would have highlighted that fact and should have been given, but even without it defense counsel was able to argue his theory of the case. Cienfuegos has not met the *Strickland* requirement that his counsel's errors were so serious as to deprive him of a fair trial. Cienfuegos has failed to show that confidence in the jury's verdict has been undermined by the failure of his counsel to request the diminished capacity instruction. Therefore, Cienfuegos has not shown that he received ineffective assistance of counsel in this case.

Cienfuegos at 230.

Similarly, the jury in this case was given an instruction intent. Unlike *Cienfuegos,* the evidence at trial of impairment from drugs was virtually non-existent. Nevertheless, the jury could take that evidence, *or lack thereof,* into account when considering whether Mr. Ricardez acted with the requisite mental state. This allowed the defense to argue its theory of the

case. Accordingly, Mr. Ricardez was not prejudiced and thus defense counsel did not render ineffective assistance.

> **3. Upon remand, the trial court should adjust the period of community custody on count one, assault in the second degree, to 0 months, so that the base sentence and the enhancement do not exceed 120 months. To the extent that the judgment & sentence is ambiguous as to which enhancements apply to which counts and the total amount of confinement, the trial court, in its discretion, should be free to clarify the judgment & sentence.**
>
> The punishment imposed for an offense cannot exceed the maximum term set by the Legislature. When several offenses are sentenced together, the statutory maximum is applied to each offense separately. Thus, the total confinement imposed for each offense, including any enhancement for that offense, must not exceed the maximum.

State v. Thomas, 113 Wn. App. 755, 757, 54 P.3d 719 (2002).

Firearm enhancements "must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. RCW 9.94A.533(3). Furthermore, "all firearm enhancements under this section are mandatory, shall be served in total confinement,

and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter." RCW 9.94A.533(3)(e). If the imposition of an enhancement increases the sentence so that it would exceed the statutory maximum, the portion of the sentence representing the enhancement cannot be reduced. RCW 9.94A.599. Rather, the proper remedy is to reduce the term of community custody. RCW 9.94A.701(8) (in effect at the time of Appellant's sentencing, now RCW 9.94A.701(10), Laws of 2021 chapter 242 section 6) required that "[t]he term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021."

Count 1 of the information, assault in the second degree, is a class B felony with a maximum possible penalty of ten

years in prison (120 months). RCW 9A.36.021(2)(a); RCW 9A.20.021(b). Appellant was sentenced to 84 months in prison, 36 months of community custody and a 36-month firearm enhancement for a total of 156 months. CP 112, 113. The term of community custody was later reduced to 18 months by order of the trial court dated August 16, 2021, CP 129-131, for total confinement on count one of 138 months, which still exceeds the statutory maximum by 18 months.

The proper remedy is to remand for the trial court to reduce the term of community custody on count one to 0 months so that the base range and the enhancement do not exceed 120 months. To the extent that the judgment & sentence should be clarified as to which enhancements apply to which counts, and the total amount of confinement ordered, the trial court should be allowed, in its discretion, to make that clarification.

CONCLUSION

Based on the testimony and evidence produced at trial, Appellant was not entitled to an involuntary intoxication instruction. While the offenses contain the requisite mental state, intent, there was not substantial evidence of Mr. Ricardez's consumption of drugs nor that drugs affected his ability to act with intent. "It is well settled that to secure an intoxication instruction in a criminal case there must be substantial evidence of the effects of alcohol on the defendant's mind or body." *State v. Gallegos,* 65 Wn. App. 230, 237-38, 828 P.2d 37 (1992) (quoting *Safeco Ins. Co. v. Mcgrath,* 63 Wn. App. 170, 179, 817 P.2d 861 (1991)). Accordingly, defense counsel did not render ineffective assistance. And, even if the court finds that the instruction should have been given, Mr. Ricardez was not prejudiced because the instructions allowed counsel to argue the defense theory of the case. Furthermore, Appellant cannot show (and has not shown) a

reasonable probability that, had the instruction been given, the outcome of the trial would have been different.

Upon remand, the term of community custody in count one should be amended so that the term of incarceration and the firearm enhancement do not total more than 120 months, and the judgment & sentence should be clarified as to which enhancements apply to which counts and as to the total term of incarceration.

Other than remand for correction of the judgment & sentence, and for all the reasons stated herein, this appeal should be denied and the Appellant's convictions affirmed.

This document contains 5,553 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 19th day of August, 2022.

Respectfully Submitted,

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GRAYS HARBOR COUNTY PROSECUTING ATTORNEY'S OFFICE

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